

EXHIBIT “K”

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7 Greystone Servicing Corporation, Inc., and
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)**

13 SANTA FE POINTE, LP, an Oklahoma
14 limited partnership; SANTA FE
15 MANAGEMENT, LLC, an Oklahoma
limited liability company; RANT, LLC, a
Delaware limited liability company; and
THEOTIS F. OLIPHANT, an individual,

Plaintiffs.

v.

18 GREYSTONE SERVICING
19 CORPORATION, INC., a Georgia
20 corporation; GREYSTONE CDE, LLC, a
Delaware limited liability company, and
DOES 1 through 100, inclusive.

Defendants.

CASE NO. C 07-05454 JCS

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION FOR
RECONSIDERATION OF
FEBRUARY 4, 2008 ORDER
DENYING DEFENDANTS'
MOTION TO TRANSFER VENUE**

Ctrm: A (15th Floor)
Before: Hon. Joseph C. Spero

Date: July 25, 2008
Time: 9:30 a.m.

1 I. **SUMMARY OF REPLY**

2 Three key (and new) facts are not contested and are dispositive:

- 3 (1) **All parties agree that this matter must be litigated in only one venue –**
 4 **not concurrently in two venues on opposite coasts.¹**
- 5 (2) **Of the two venues, only New York has before it all claims by all parties.**
 6 **The California action is but a subset of the New York action.²**
- 7 (3) **The Oliphant Parties "unconditionally and irrevocably" consented in**
 8 **writing that New York was a proper venue, and that they would not**
 9 **challenge New York as a proper venue.³ There is nothing "permissive"**
 10 **about their agreement.**

11 These three key points end all reasonable debate; New York is the only proper venue.

12 Were more needed, and though the Oliphant Parties feign otherwise, it is also undisputable
 13 that:

- 14 (4) **The New York action – with a current trial date of May 2008 and**
 15 **motions for partial adjudication pending – is far more advanced than**
 16 **this action.⁴**

17 With this, and even putting reason aside, only the *most* intractable and irrational advocate
 18 could continue to argue that the larger New York action should be sent to the smaller
 19 California action, based on a motion brought in express breach of the parties' written,
 20 express "unconditional and irrevocable" consent to New York venue. Patently, the smaller
 21

22 ¹ As the Oliphant Parties concede, "the interest of justice mandates against the parties
 23 litigating identical issues in two fora." See Declaration of Erik Swanholt (doc. # 50)
 ("Swanholt Decl."), Ex. 1 at 1.

24 ² Unlike New York, the claims of Greystone CDE, LLC are not asserted in California.

25 ³ "Pledgors hereby irrevocably and unconditionally: ... (ii) consent that any such
 26 action or proceeding may be brought in such [New York] courts, and waives any objection
that it may now or hereafter have to the venue of any such action or proceeding in any such
court or that such action or proceeding was brought in an inconvenient court and agree not to
 27 plead or claim the same." Swanholt Decl., Ex. 2 at 1, 15-16 (emph. added).

28 ⁴ In contrast, the California Defendants are not obliged even to *answer* the California
 pleading until July 2008, at the earliest.

1 California claims – already subsumed in the New York action – should be resolved once,
 2 and in New York where they will be resolved in all events.

3 Indeed, independent of the 4 undisputable truths set further above, the Oliphant
 4 Parties' change of position and admission that their California tort claims arise out of the
 5 same transaction or occurrence as Defendants' New York claims on the bridge loan
 6 guaranties – and therefore are compulsory counterclaims in New York – further reinforces
 7 that which is already inescapable. Because the Oliphant Parties' freely concede that their
 8 California claims are compulsory counterclaims to the guarantee claims made Defendants
 9 in New York,⁵ the Oliphant Parties now openly concede that even the permissive venue
 10 provisions pertaining to actions commenced outside New York (consent to actions filed
 11 inside New York is "unconditional and irrevocable") are directly in play, and further point
 12 in the direction of New York. And again, the consent that claims initiated in New York
 13 will stay there, is "unconditional and irrevocable."

14 All agree that the interest of justice mandates proceeding in a single forum.
 15 Inescapably, that forum is New York.

16 The Oliphant Parties' opposition does nothing to undermine, or even address, these
 17 controlling truths. In fact, it ignores them. Rather than dispute or even address these key
 18 points, the Oliphant Parties seek to (i) mislead this Court as to the procedural posture of the
 19 New York matter, (ii) mischaracterize the bases of this Court's prior denial of Defendants'
 20 transfer motion and (iii) convince this Court to forebear ruling on this motion until after the
 21 New York court has acted on Plaintiffs' motion to transfer that case to California (largely
 22 because the Oliphant Parties' entire argument in that motion is based upon this Court's
 23 prior rejection of Defendants' motion to transfer this matter to New York). The Oliphant
 24 Parties' arguments do not contradict or even challenge the clear and indisputable facts set
 25
 26

27 ⁵ See Fed. R. Civ. P. 13(a); see also Swanholt Decl., Ex. 1 at 1 (admitting in their
 28 motion to transfer filed in the New York action that "[t]he Oliphant parties [are] required to
raise these defenses and Counterclaims in the New York action at the risk of rendering their
 claims in the California Action moot.") (emph. added).

1 forth above. Accordingly, Defendants respectfully request that this Court grant their
 2 motion for reconsideration and order the transfer of this matter to New York.

3 **II. ARGUMENT**

4 **A. The Undisputed New Facts Make Clear That New York Is The Only**
 Permissible Venue For All Of These Claims.

5

6 Plaintiffs argued vehemently in opposition to Defendants' original motion to transfer
 7 that the New York and California matters were unrelated and thus transfer and
 8 consolidation inappropriate. Now, after asserting *all* of their affirmative claims in the
 9 California action as compulsory counterclaims in the New York action, Plaintiffs agree that
 10 the two matters are "identical."⁶ Indeed, because of this new development, as Defendants
 11 argued many months ago, Plaintiffs now agree that "the interest of justice mandates against
 12 the parties litigating identical issues in two fora." *See* Swanholt Decl., Ex. 1 at 1. Thus, the
 13 parties agree that it makes no sense, practically, legally or otherwise, for this matter to
 14 proceed concurrently with the New York matter, but instead that the two should be
 15 consolidated into one venue for efficient administration.

16 The only question is where. The answer is New York. This is true because the New
 17 York matter will not be transferred to California because it cannot be transferred to
 18 California. The New York court has already concluded that (a) the venue provisions in the
 19 guaranties are binding and enforceable, (b) Plaintiffs' consent to venue in New York is
 20 irrevocable and unconditional and (c) the first-to-file rule carries little weight under the
 21 circumstances of this case and thus does not overcome (a) and (b):

22 **More importantly, Plaintiff [Greystone] selected this forum**
 23 **based on the forum selection clauses of the loan guaranties,**
 24 **which each Defendant [Oliphant Parties] executed in favor of**
 25 **Greystone . . . Having previously agreed to litigate this case in**
 26 **New York should Plaintiff institute an action here, Defendants**

27

28 ⁶ Actually, the New York matter includes all of the claims made by and against all of
 the parties, while the California action includes only a subset of those claims and parties.

1 **cannot now claim that their burden in doing so outweighs the
2 interest of Plaintiff in proceeding with this action.**

3 Swanholt Decl., Ex. 4 (Order of Feb. 20, 2008 in the New York action) at 4 (emph.
4 added).⁷ The Court added:

5 Although it is true that Defendants filed an action in California
6 state court prior to Plaintiffs filing this action, they did not serve
7 process until the day before Plaintiff filed its action here in New
8 York, nor did they disclose the filing of their action while they
9 negotiated with Plaintiff. Moreover, as Plaintiff points out, the
10 California action was filed well after Defendants received a notice
11 of default and of Greystone CDE's intent to pursue collection
12 remedies. This sequence weighs against an application of the first
13 to file rule.

14 Swanholt, Ex. 4 (Order of Feb. 20, 2008 in the New York action) at 5.

15 Thus, given the parties' concurrence that these matters should proceed in only one
16 venue and the undisputable fact that the New York court has already ruled that Defendants'
17 affirmative claims will remain there, New York is the only venue where the parties can
18 achieve their goal of eliminating the possibility of litigating two nearly "identical" matters
19 on opposite coasts.

20 B. **Plaintiffs' Opposition Raises Arguments That Are Inapposite And
21 Insufficient To Overcome The Undisputed Facts Set Forth Above.**

22 Plaintiffs do not dispute any of the changed circumstances that make reconsideration
23 appropriate here, nor can they. Instead, Plaintiffs attempt to mischaracterize the claims and
24 contracts in this matter to avoid having to perform their promise to litigate in New York.

25

26 ⁷ The venue provision interpreted by the New York court reads, in pertinent part:
27 "Pledgors hereby **irrevocably and unconditionally**: (ii) consent that any such action or
28 proceeding may be brought in such [New York] courts, and waives any objection that it may
 now or hereafter have to the venue of any such action or proceeding in any such court or that
 such action or proceeding was brought in an inconvenient court and agree not to plead or
 claim the same."

1 **Procedural Posture of the New York Action:** The Plaintiffs claim that
2 Defendants' argument that the New York matter is proceeding faster than the California
3 action is inaccurate because in California discovery has commenced and a mediation is
4 scheduled for late May. *See Opp'n* (doc. # 56) at 4:20-27. While accurate, the point is
5 trivial when compared with the fact that the New York matter is scheduled to commence
6 trial on May 12, 2008 – one year earlier than the May 11, 2009 trial date in this action.
7 Indeed, Defendants' answer in the California action is not due, if at all, before July.
8 Regardless of whether the New York trial date sticks, the New York matter will proceed to
9 trial sooner than this matter. That the parties in that action have chosen not to engage in
10 discovery to date, or that the New York court has not ordered the parties to mediation, does
11 not have any bearing on where that matter is relative to trial and resolution.

12 **Basis of the Court's Earlier Ruling:** In their opposition, the Plaintiffs suggest that
13 the Greystone Defendants have mischaracterized the Court's February 4, 2008 Order, and
14 claim that "the existence of the New York action had little, if any, bearing on the Court's
15 Order." *Opp'n* (doc. #56) at 3:1-2. The reality, however, is that in opposing Defendants'
16 motion to transfer, Plaintiffs argued that Defendants' claims in the New York action were
17 unrelated to their tort claims in the California action in an effort (1) to evade the forum-
18 selection clauses to which they had agreed and also (2) to suggest that judicial efficiency
19 would not be advanced by the transfer and consolidation of the two actions in a single
20 forum. The Court accepted Plaintiffs' characterization of their claims and the two pending
21 actions, the venue provisions in the guaranties were not applied to Plaintiffs' affirmative
22 California claims and Defendants' motion was denied.

23 Since then, the Oliphant Parties have asserted all their claims in this action in New
24 York as "identical" counterclaims raising "identical issues." *See* Swanholt Decl., Ex. 1 at
25 1. As Plaintiffs now admit, they were "required to raise these defenses and Counterclaims
26 in the New York action at the risk of rendering their claims in the California Action moot."
27 Plaintiffs recognize that the claims in this action are compulsory counterclaims in the New
28 York action because, contrary to their previous representations to this Court, their claims do

1 "arise[] out of the same transaction or occurrence that is the subject matter of" Greystone
 2 CDE, LLC's claims in the New York action, *i.e.*, the bridge loan transaction, *see* Fed. R.
 3 Civ. P. 13(a). As they now explain:

4 [T]he California Action is not limited to claims pertaining to
 5 [Greystone] Servicing's malfeasance. The California Action also
 6 asserts a cause of action that directly addresses the [Greystone]
 7 CDE loan guarantees, seeks a declaration the parties' rights and
 8 liabilities with respect to those guaranties, and seeks a declaration
 9 concerning any rights to set-off the Oliphant Parties might possess.

10 Swanholt Decl., Ex. 1 at 4 n.4.

11 In their opposition to Defendants' motion to reconsider, Plaintiffs do not contend
 12 otherwise. Instead, they seek to avert the issue by characterizing their claims in New York
 13 as "protective counterclaim[s] . . . required to place the issues there in proper perspective
 14 should that litigation proceed." This nonsensical explanation has no basis in the Federal
 15 Rules and, more importantly, does nothing to alter the inexorable conclusion that their
 16 claims in this action arise out of the transaction or occurrence at issue in the New York
 17 action; namely, Plaintiffs' breach of their obligations under the bridge loan guaranties. And
 18 as the parties' choice of venue provision states:

19 Pledgors hereby irrevocably and unconditionally: (i) submit
 20 themselves and their respective property in any legal action or
 21 proceeding **relating to this agreement, or any other document**
 22 **executed in connection with the transactions contemplated by**
 23 **the loan agreement** . . . to the non-exclusive general jurisdiction of
 24 the courts of the State of New York . . .

25 Swanholt Decl., Ex. 2 at 1, 15-16 (emph. added).

26 Accordingly, regardless of Plaintiffs' prior representations to the Court, there can be
 27 no dispute now that the New York and California matters *are* related, that they are all based
 28 upon the same "transaction or occurrence" and that therefore the venue provisions applying

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1 to "any other document" in connection with those transactions, including the Engagement
2 Agreement forming the basis of Plaintiffs' California claims, should be enforced.

3 **Consideration of this Motion Is Not Premature:** In a last ditch effort to avoid
4 transfer of this matter, Plaintiffs suggest that the Court should delay its reconsideration of
5 Defendants' motion to transfer until the New York court has had an opportunity to resolve
6 the Plaintiff's motion to transfer in the New York action. *See Opp'n* (doc. # 56) at 5-6.
7 However, in that motion, Plaintiffs conveniently jettison all of the previous arguments by
8 which they had persuaded this Court to deny Defendants' motion, and, instead, rely on
9 Defendants' argument of judicial efficiency (which they had previously opposed) in their
10 bid to have the New York Court transfer Defendants' affirmative New York action to
11 California.⁸ *See* Swanholt Decl., Ex. 1 at 6-11.

Tellingly, Plaintiffs' New York motion relies heavily on this Court's denial of Defendants' transfer motion.⁹ Clearly, Plaintiffs hope that the New York court will change its previously stated conclusions and order transfer of the New York matter to California, relying solely upon this Court's order denying Defendants' motion to transfer the California matter to New York. Based upon the foregoing, however, it makes much more sense for this Court to reconsider its prior order before the New York court relies on that order.

18 | Dated: April 25, 2008

JONES DAY

By: Mark D. Kemple
Mark D. Kemple
Attorneys for Defendants Greystone
Servicing Corporation, Inc. and Greystone
CDE, LLC

⁸ Against the backdrop of their double-tongued filings in the two actions, the Oliphant Parties have the audacity to insinuate that the Greystone Defendants are “making this litigation as costly as possible,” *see Opp’n* (doc. # 56) at 1:22-25. when, in reality, it is only Mr. Oliphant who benefits from delaying the inevitable, driving up costs, and frustrating Greystone’s efforts to collect a sizable debt that Mr. Oliphant does not dispute he owes.

⁹ See Decl. of W. Schofield (doc. # 56) (“Schofield Decl.”), Ex. C at 1 n.4 (“Greystone has already made that motion [to transfer] in California – and they lost. The California court decided to retain jurisdiction; and the California Action proceeds on its course.”)

EXHIBIT “L”

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JONES DAY

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April 25, 2008

Magistrate Judge Joseph C. Spero
United States District Court for the Northern District of California
450 Golden Gate Ave., Courtroom A, 15th Floor
San Francisco, CA 94102

Re: Santa Fe Pointe, L.P. v. Greystone Servicing Corp., Inc., C07-05454 JCS

Dear Judge Spero:

We are in receipt of the Court's April 24, 2008 Order continuing the hearing on Defendants' motion for reconsideration to July 25, 2008. We note that this was issued in response to Plaintiffs' ("Oliphant Parties") opposition, but prior to Defendants' Reply. The Oliphant Plaintiffs requested in opposition, and this Court appears to have determined, that this Court's resolution of whether California is a proper forum should await the New York Court's decision on a like request there. Though we disagree with that ordering, and would have so stated in Reply, we write to gain clarification that **all proceedings in this matter are stayed** until this Court rules upon Defendants' motion. Though we believe that this is implicit in the Court's Order, it is not express. Indeed, the one thing that all parties agree on (and have voiced in their competing motions to transfer) is that duplicative litigation and discovery must be avoided. Simply, three points support the stand-still instruction implicit in this Court's order:

- (1) The parties now agree that duplicative and costly litigation of nearly identical actions on opposite coasts is wasteful and unnecessary. Yet that is exactly what will occur in this matter if a stay of these proceedings is not ordered;
- (2) Judge Patterson has already rejected the arguments made by the Oliphant parties' in support of their pending motion to transfer the New York matter to California;
- (3) The Oliphant Parties' "**irrevocable and unconditional**" consent to the New York venue – the only venue in which **all** claims by **all** parties is pending – renders New York alone the venue that all parties agree all claims by and between all parties **can** and **will** be heard. There is nothing permissive about the Oliphant's waiver of any ability to transfer an action in New York once brought there.

First, staying all proceedings in this matter until the Court rules on Defendants' motion for reconsideration is appropriate because it is consistent with both parties' wishes and this Court's implicit ruling that duplicative litigation in these matters must be avoided. If a stay is not put in place, witnesses, including third parties, may be subject to duplicative and unnecessary discovery, all before this Court rules on Defendants' motion in July, thus defeating one of the primary purposes of consolidation of these cases – avoiding duplicative and wasteful efforts in

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JONES DAY

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matters pending on opposite coasts. Of course, the parties remain free to engage in discovery in New York – the venue to which the Oliphant Parties have given their "irrevocable and unconditional" consent.

Moreover, the Oliphant Parties have claimed that the Greystone Defendants, by their motion, seek nothing more than to make "this litigation as costly as possible for Mr. Oliphant and the entity Plaintiffs." Opp'n, 1:22-23. Defendants dispute the Oliphant Parties' charge and indeed have sought, on multiple occasions, to avoid the unnecessary expenditure of resources in this matter when it was appropriate to do so. Here, Defendants again make a similar request and provide an opportunity for Plaintiffs to avoid the unnecessary expenditure of resources by staying all proceedings in this matter, including discovery and mediation, until the Court rules on Defendants' motion to transfer. If the Oliphant Parties are truly interested in keeping costs down, they will gladly support Defendants' request.

Second, and more specifically, the Oliphant Parties' pending Motion to Transfer in the New York case notwithstanding, Judge Patterson in New York already *has* ruled on the merit of the Oliphant Parties' argument that New York is not the proper forum for this dispute – indeed *rejected* that very argument, in writing:

More importantly, Plaintiff [Greystone] selected this forum based on the forum selection clauses of the loan guaranties, which each Defendant [Oliphant Parties] executed in favor of Greystone CDE.... Subsequent to signing the loan and guaranty agreements, Defendant Oliphant's law office rendered a legal opinion as to the validity and enforceability of the bridge loan agreement and the partners' guaranties thereof. Having previously agreed to litigate this case in New York should Plaintiff institute an action here, Defendants cannot now claim that their burden in doing so outweighs the interest of Plaintiff in proceeding with this action.

Swanholt Decl. to Motion for Reconsideration ("Swanholt"), Ex. 4, at 4. No claim realistically can be made that New York is not the appropriate forum. The Oliphant Parties' New York motion does not become "realistic" by their decision to ignore this prior Order.

Third, it is simply beyond reasonable debate, given the new facts that have led to this Court's reconsideration, that Judge Patterson's ruling is correct. Three key (and new) facts are not contested and are dispositive:

- (1) All parties agree that this matter must be litigated in only one venue – not concurrently in two venues on opposite coasts.¹

¹ As the Oliphant Parties concede, "the interest of justice mandates against the parties litigating identical issues in two fora." See Swanholt, Ex. 1 at 1.

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JONES DAY

Magistrate Judge Joseph C. Spero
 April 25, 2008
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- (2) Of the two venues, only New York has before it all claims by all parties. The California action is but a subset of the New York action.²
- (3) The Oliphant Parties "unconditionally and irrevocably" consented in writing that New York was a proper venue, and that they would not challenge New York as a proper venue.³ There is nothing "permissive" about their agreement.

These three key points end all reasonable debate; New York is the only proper venue. Were more needed, and though the Oliphant Parties feign otherwise, it is also undisputable that:

- (4) the New York action – with a current trial date of May 2008 and motions for partial adjudication pending – is far more advanced than this action.⁴

With this, and even putting reason aside, only the *most* intractable advocate could continue to argue that the larger New York action should be sent to the smaller California action, based on a motion brought in express breach of the parties' written, express "unconditional and irrevocable" consent to New York venue. Patently, the more narrow California claims – already subsumed in the New York action – should be resolved in New York where they will be resolved in all events.

Based upon the foregoing, staying all proceedings in this matter until this Court has ruled upon Defendants' motion for reconsideration saves the resources of the parties and the Court, and the witnesses who might otherwise be deposed twice. Given the recent substantive changes in the posture of the two matters at issue and the likelihood that this Court will grant Defendants' motion to transfer this matter to New York, allowing the parties to proceed with written discovery, document production, depositions, etc. in California makes little sense. Defendants, request this Court to stay all proceedings until the Court rules on the transfer motion.

Respectfully submitted,

Mark D. Kemple
 Counsel for Defendants

cc: William Schofield, Esq.

² Unlike New York, the claims of Greystone CDE, LLC are not asserted in California.

³ "Pledgors hereby **irrevocably and unconditionally**:... (ii) consent that any such action or proceeding may be brought in such [New York] courts, and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agree not to plead or claim the same." Swanholz, Ex. 2 at 1, 15-16.

⁴ In contrast, Defendants are not obliged even to *answer* the California pleading until August 2008.

EXHIBIT “M”

PINNACLE LAW GROUP LLP

April 28, 2008

Magistrate Judge Joseph C. Spero
United States District Court for the Northern District of California
450 Golden Gate Ave.
Courtroom A, 15th Floor
San Francisco, CA 94102

Re: Santa Fe Pointe, LP, et al. v. Greystone Servicing Corp., Inc., et al.
Action No. C07-05454 JCS

Dear Judge Spero:

We have received Greystone's April 25, 2008 letter to the Court, which purports to seek "clarification" of the Court's April 24, 2008 Order. Greystone's letter is simply an *Ex Parte* motion to stay proceedings.

Plaintiffs strongly object to any stay and disagree that such a stay is "implicit in the Court's Order."

To the contrary, at the Case Management Conference on February 8, 2008, the Court ordered the parties to conduct enough discovery to enable the parties to engage in a meaningful mediation session. The Court further ordered the parties to conclude that mediation by the end of May 2008 and to report to the Court at a follow-up Case Management Conference in early June 2008. Plaintiffs have proceeded with that timeline in mind and there is presently scheduled a full day mediation on May 22, 2008 before Peter Sherwood (as well as a conference call with Mr. Sherwood on May 12, 2008).

Plaintiffs advised the Court of these dates in their opposition to Greystone's motion for reconsideration. That the Court did not stay proceedings or alter this agreed-upon schedule makes clear that the Court wishes the parties to proceed with it, and Plaintiffs intend to do so. The pending motion to transfer venue in New York has no bearing on this schedule.

Plaintiffs suspect that Greystone's request to stay the proceedings is purely tactical, designed to enable Greystone to notify Judge Patterson in New York that this case has been stayed in order to bolster their opposition to Plaintiffs' motion to transfer venue pending in New York.

As stated above, the matter before this Court is scheduled for mediation and discovery continues. The Greystone defendants were once successful in New York in sabotaging settlement conference before the Court there. This Court hopefully sees the

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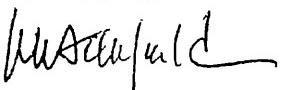
Magistrate Judge Joseph C. Spero

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continued and endless game playing by Greystone and denies the request for stay to allow the mediation before Mr. Sherwood to move forward.

Very truly yours,



William W. Schofield